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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 849

JACOB SPEVAK, doing business as
J. SPEVAK AND COMPANY and GEORGE LERIAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF JACOB SPEVAK, DOING BUSINESS AS J. SPEVAK AND COMPANY AND GEORGE LERIAN FOR A WRIT OF CERTIORARI TO REVIEW JUDGMENTS ENTERED DECEMBER 6, 1946, BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AFFIRMING JUDGMENTS OF CONVICTION ON 31 COUNTS ENTERED JUNE 24, 1946, BY THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND ON CRIMINAL INFORMATION OF 40 COUNTS CHARGING VIOLATIONS OF U. S. C., TITLE 50 APP., SECS. 902 (a), 904 (a), 905 (b), REVISED MAXIMUM PRICE REGULATION 169, SECS. 1364. 401 (a), 1364. 451; 7 F. R. 10381, 8 F. R. 4844, 8 F. R. 7675. TO WIT.: SELLING MEAT IN EXCESS OF THE CEILING PRICE PURSUANT TO THE EMERGENCY PRICE CONTROL ACT OF 1942 AS AMENDED, AND BRIEF IN SUPPORT THEREOF.

NORMAN S. BOWLES, JR.,
SYMONE S. SPECTOR,
ROBERT E. COUGHLAN, JR.,
Attorneys for Petitioners.

The Daily Record Co., Baltimore 3, Md.

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. OPINION BELOW.

The District Court filed no opinion in the cases which were tried together. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, dated December 6, 1946, has not as yet been officially reported, but will be contained in the record following page 235.

JURISDICTION.

The jurisdiction of this Court to issue a writ of certiorari to review the Judgments of the Circuit Court of Appeals, dated December 6, 1946, is invoked under Sec. 240 of the Judicial Code as amended (28 U. S. C. 347). See also Rule 38 of the Supreme Court, 28 U. S. C., following Sec. 354, and Rule 11 of the Rules of Practice and Procedure in Criminal Cases, promulgated May 7, 1934, 18 U. S. C., following Sec. 688.

FEDERAL STATUTE INVOLVED.

The Sixth Amendment of the Constitution, U. S. C. Annotated, Constitution, Sixth Amendment, Page 327:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense."

QUESTIONS PRESENTED.

1. (a) Whether the constitutional and statutory rights of the Petitioners were not infringed by the refusal of the Court to grant a further continuance for the purpose of permitting the Petitioners to obtain trial counsel.

(b) Whether the constitutional rights of the Petitioners were prejudiced by the failure of the Court to grant a continuance for the purpose of permitting the Petitioners to employ trial counsel.

STATEMENT OF THE CASE.

On November 13, 1945, the Petitioners were first brought to the District Court for arraignment (R. 53). At that time, they were represented by counsel, one Albert Smalholtz of New York, and were given until November 30, 1945, to file preliminary motions and obtain trial counsel, (R. 54). Apparently, not very much was done in the way of bringing the Petitioners to trial until May 31, 1946, when they were ordered to appear in Court on June 10, 1946, to answer an information containing forty (40) counts, (R. 54). The notice to appear on May 31, 1946, to answer the criminal information of forty (40) counts was by letter, (R. 55). It appears that between November 30, 1945 and May of 1946, that the District Attorney's office was contacted by Mr. Leahy, a member of the bar of the District of Columbia and it would appear that the District Attorney's office was of the impression that Mr. Leahy was representing the Petitioners. The reason for the delay in attempting to bring the case to trial earlier was to permit Mr. Leahy to complete the trial of a case which he was engaged in in the District of Columbia. On June 5, 1946, (R. 55), the District Attorney's office was notified by Mr. Leahy that he could not try the case on June 10, 1946, and requested a postponement, (R. 55). This postponement was refused by the District Attorney's office. On June 8, 1946, Norman S. Bowles, Jr., a member of the bar of the District of Columbia after having previously been in touch with the District Attorney's office, had a conference with Judge Coleman in his chambers and advised the Court that because he, Mr. Bowles, had been engaged as counsel to a Congressional Committee that he would be unable to appear for the Petitioners, (R. 51). Mr. Bowles in his statement to the Court on June 18, 1946, explaining his inability to represent the Petitioners, advised the Court that Mr.

Leahy on the very morning that Mr. Bowles was addressing the Court, June 18, 1946, stated that Mr. Leahy needed additional time to prepare the case or he would be compelled to withdraw from it (R. 53). At that time, the Assistant United States District Attorney stated that he understood that Mr. Leahy had withdrawn from the case, (R. 53).

The trial of the case was then continued by Judge Coleman until June 18, 1946, (R. 56). It would appear from an examination of the record that June 10, 1946, was the first time that the case had been assigned for trial or any definite date set since November 13, 1945, at which time the Petitioners were originally arraigned and were given until November 30, 1945, to file preliminary motions and obtain trial counsel.

On June 18, 1946, the Petitioners appeared in Court accompanied by Norman S. Bowles, Jr., and the appearances of Abraham Glasser and Edward A. Schaub, Jr., had apparently been entered. It is not clear from the record for what purpose Mr. Schaub appeared but it is abundantly clear that Mr. Glasser appeared for the sole purpose of filing a motion to the effect that the particular act under which the Petitioners had been indicted was unconstitutional. It also appears from the record that Mr. Glasser intended to ask the Court to stay proceedings pending an appeal to the Emergency Court of Appeals on this motion. On June 16, 1946, it would appear, was the first time that Mr. Glasser had entered the case, (R. 52). It also appears that between June 10, 1946, and June 18, 1946, a number of attorneys were contacted by the Petitioners and among them, Robert R. Carman. Mr. Carman, on June 19, 1946, was contacted and went to Court and indicated his willingness to appear, if a reasonable continuance was granted, (Appellants' brief, page 33 and 34). The case was tried on June 19, 1946, the Petitioners found guilty on thirty-one

counts, not guilty on nine counts. On June 24, 1946 the Petitioners were sentenced and are at present in the Federal penitentiary at Petersburg, Virginia.

It is the contention of the Petitioners that had they been granted this continuance, they would have had able counsel to appear for them and that the delay occasioned by this continuance would not have operated as a hardship against the Government and that the Court in refusing this continuance and in insisting on the trial proceeding without further delay, deprived the Petitioners of their constitutional rights as afforded them by the Sixth (6th) Amendment. The Petitioners further contend that, by being compelled to defend their cases themselves, they were materially prejudiced in that not being acquainted with the rules of procedure as well as the rules of evidence, a number of things happened in their trial which would not have occurred had they been represented by counsel. These matters are specifically referred to as being the opening statement by Mr. Spevak, one of the Petitioners, made on his own behalf, (R. 178), which brought about the remarks of the Assistant United States District Attorney, Mr. Kenney, (R. 181), which were:

> "(Mr. Kenney) I assume that was meant to be testimony. We have no objection because of the fact that he was not sworn, and are willing for it to be in the record as testimony, and we waive cross-examination.
>
> If you think it is advisable I will put on some testimony in rebuttal."

This in turn occasioned the remarks of the Court which appear (R. 182) and resulted in a witness, Jesse R. Sachse, being called by the Government, which witness could not have properly been called except to rebut testimony of Mr. Spevak and the Assistant District Attorney construed the opening statement of Mr. Spevak to be testimony which

was directly in conflict with the statement made by the Court at the beginning of the trial on June 19, 1946:

> "Following those opening statements,—which are not evidence but merely introductory statements * * *" (R. 112).

This was followed by the Government calling, at what would appear to be the insistence of the Court:

> (The Court) "Mr. Staffe was mentioned" (R. 187).

And following this, a Mr. Steffe was called, and it would certainly appear that these are one and the same person. This followed the introduction of photostatic copies of invoices which were permitted to be introducted and no objection made on behalf of the Petitioners. It is also true that no objection to the Assistant District Attorney's remarks relating to the opening statement of one of the Petitioners as well as the calling of these witnesses in rebuttal.

None of these occurrances would have taken place had the Petitioners been represented by counsel. If they had, proper and timely objection would have been made to enable this procedure to have been reviewed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in failing to reverse the judgment of the Lower Court and award a new trial to the Petitioners and as all of the points, urged in support of the petition for the writ of certiorari, have been presented in the Statement of the Case, they will not be repeated here.

REASONS FOR GRANTING WRIT.

I. Misinterpretation of the decisions of this Court and conflict with the decisions of other Circuit Courts of Ap-

peals, specifically, United States vs. Bergamo 154 F. (2d) 31; and Johnson vs. Zerbst, 304 U. S. 458; Glasser vs. U. S., 315 U. S. 60.

II. Depriving the Petitioners of counsel as provided by the Sixth Amendment to the Constitution.

It is submitted that the failure and refusal of the District Court to grant the continuance requested by the Petitioners and their showing that they could have procured able counsel in that of Robert R. Carman, had a continuance been granted for a reasonable length of time, prejudiced the Petitioners and a review of the decision of the United States Court of Appeals for the Fourth Circuit is respectfully urged.

Respectfully Submitted,

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SYMONE S. SPECTOR,

ROBERT E. COUGHLAN, JR.,

Attorneys for Petitioners.

BRIEF IN SUPPORT OF THE PETITION.

FACTS.

The facts have been fully set forth in the Petition and hence will not be repeated.

ARGUMENT.

Refusal of the District Court to continue the Case for the purpose of enabling the Petitioners to secure counsel to defend them as guaranteed them by the Sixth Amendment of the Constitution.

On behalf of the Petitioners, it is most urgently contended that they were not trifling with the Court below. The District Court, we submit, by reason of the fact that the Petitioners in their quest of counsel to aid and assist them in the defense of the charges brought against them by the Government felt that the efforts of the Petitioners were not sincere and were not real and that they were seeking means to delay the trial. We most respectfully submit that a painstaking and careful review of the events leading up to the trial will definitely erase this impression. Messrs. Spevak and Lerian were arraigned on November 13, 1945. They appeared through counsel and were allowed until November 30 1945, to file preliminary motions and to engage trial counsel. It can most reasonably be inferred that following this continuance, that the services of a Washington attorney had been obtained. This statement is more than supported, we submit, by the fact that no serious effort; or, in fact, any effort was made to bring the Petitioners to trial until on May 31, 1946, when they were notified by letter that their trial would take place on June 10, 1946. In the interval between November and May, the United States District Attorney's office had been in communication and contact with the office of Mr. Leahy. The case against the Petitioners was permitted to rest be-

cause Mr. Leahy was engaged in the trial of an important case in the District of Columbia. Surely it could not be said, nor could it be inferred that from November until May the Petitioners had trifled with the Court or that they had failed to engage counsel. After being notified on May 31, 1946 by letter that their case would be tried on June 10, shortly after that they apparently discovered that Mr. Leahy was unable to try the case on June 10, 1946. It certainly could be inferred that they had also secured the services of Norman S. Bowles, Jr., a member of the Bar of Washington in addition to Mr. Leahy. Mr. Bowles, apparently in the interval between May 31 and June 10, had been appointed counsel to a Congressional Committee and consequently he did not feel at liberty to represent the Petitioners in the actions brought against them by the Government. In response to Mr. Bowles request, the trial of the case was continued until June 18, 1946, a continuance of but a week, and in that space of time the Petitioners were permitted to engage trial counsel. It is certainly more than a reasonable inference from a careful and painstaking review of the record, that an effort was made by the Petitioners to employ trial counsel. Their efforts, however, were unsuccessful, but they did succeed in prevailing upon Mr. Carman to appear before Judge Coleman on June 19, 1946, and to assure the Court that he would undertake the defense of the case if permitted a reasonable opportunity to prepare it. Therefore, we respectfully state that a request for a second continuance upon the assurance of Mr. Carman himself, in person in Court, that he would undertake the defense of the Petitioners if permitted a reasonable length of time to prepare the defense, was concrete evidence of the fact that the Petitioners had done everything within their power to secure the services of able trial counsel and that they were not delaying their trial by interposing trifling excuses.

This Court has, in a number of cases, held that an accused person was entitled to the benefit and asistance of counsel as guaranteed by the Sixth (6th) Amendment of the Constitution. This amendment is not one of mere words. It was added to the Constitution for a specific and definite purpose. It was intended to insure persons accused of crimes of adequate protection so that no one would be imprisoned or fined without a fair and impartial trial, plus the advice and assistance of able counsel.

We respectfully submit that the decision of the United States Court of Appeals in the Fourth Circuit in the instant case is in direct conflict with the case of United States vs. Bergamo, 154 F. (2d) 31. In referring to the Sixth Amendment of the Constitution, the Court through Judge Biggs, on page 34, stated:

> "The Sixth Amendment provides inter alia that 'in all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.' The Supreme Court has held that the right to the assistance of counsel includes the right to counsel of the Defendant's choosing. (See cases cited)".
>
> "There is no question but that the right to the assistance of counsel for defense means effective assistance. Assistance is not effective when counsel has insufficient time to prepare his defense. Here again the authorities are in agreement. (See cases cited)".

In the case of Powell vs. Alabama, 287 U. S. 45, this Court by reason of the fact that the Defendants were denied the right of counsel granted a new trial. Mr. Justice Sutherland, speaking for this Court on page 68, stated:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometime no skill in the science of law. If charged with crime, he is incapable, gen-

> erally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel in every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

This case clearly shows that this Court felt that unless a person was skilled in the science of law, that he could not adequately defend himself and that the employment and assistance of counsel was a necessary element to a fair and just trial.

In the case of Johnson vs. Zerbst, 304 U. S. 458, Mr. Justice Black, speaking for this Court on page 462, stated:

> "The Sixth Amendment guarantees that 'in all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense'. This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the constitution as originally adopted provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The

> Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recollection of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, ordinary and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter this court has pointed to '* * * the humane policy of the modern criminal law * * *'. Which now provides that a defendant '* * * if he be poor, * * * may have counsel furnished him by the state * * * not infrequently * * * more able than the attorney for the state'."

It is true that in the Johnson vs. Zerbst case, supra., the proceedings were by way of the writ of a habeas corpus hearing. This Court, nevertheless, stated in unequivocal terms that the Sixth Amendment was not a mere statement of idle words.

We submit that the instant case is quite easily distinguished from that of Avery vs. Alabama, 308 U. S. 444, and that of Betts vs. Brady, 316 U. S. 455. In the latter case, the accused and Petitioner had experience in the trial of cases having had a previous record before being tried in the Circuit Court of Charles County for the charge of which he was convicted.

We urge that the principles to be applied in the instant case are controlled by those applied in Glasser vs. U. S., 315 U. S. 60. In this case the Petitioner was an experienced attorney. He had engaged the services of competent counsel to represent him, but because the judge in the District Court appointed the same lawyer whom he had engaged,

to defend another person indicted together with Glasser over Glasser's single protest, a new trial was awarded. The United States Circuit Court of Appeals of the Fourth District, in its decision, laid considerable stress on the fact that the Petitioners had been trifling with the Court and that by their actions that they had waived the right to be represented by counsel. In the Glasser case, supra, Mr. Justice Murphy, speaking for this Court on page 70, stated:

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. (See cases cited) Glasser never affirmatively waived the objection which he initially advanced when the trial court suggested the appointment of Stewart. * * * The fact that Glasser is an attorney is, of course, immaterial in a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel. (See cases cited). But it is by no means conclusive."

Again on page 75, in this same case, this Court speaking through Mr. Justice Murphy held:

> "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.
>
> To determine the proper degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The unfortunate dilemma of the Petitioners in the instant case was that they had many lawyers for special purposes, but had not been able to secure the services of one who would represent them where they need representation and assistance the most, to wit: trial counsel, when their cause was heard. Had there been a number of postponements, it could be said that they were guilty of trifling with the Court. Had they been unable to present to the Court able trial counsel who would represent them and had they merely advised the Court on the day that their case was to be tried, that they were unable to engage the services of trial counsel and had no reasonable expectation of obtaining such counsel, then it could be said that they were trifling with the Court. On the other hand, it was abundantly clear that these men had made frantic efforts to obtain trial counsel to defend them and had at last succeeded, but unfortunately for them, they were checked at the moment of their success because the District Court would not indulge the counsel that they had succeeded in obtaining, a continuance for a reasonable length of time to permit him to prepare the case.

CONCLUSION.

It, therefore, follows that the efforts which have been heretofore pointed out in some detail, operated to their distinct prejudice. Their failure to have counsel to assist at the trial resulted in the Assistant District Attorney construing and accepting the opening statement of Mr. Spevak as evidence and the Court permitted this. Having then accepted the opening statement of one of the Petitioners as evidence, the Court then permitted the Government to call witnesses to rebut an opening statement accepted as evidence by the Assistant United States District Attorney in the face of the fact that the District Court in

its opening remarks to the jury and to the Petitioners in outlining the procedure to be followed stated:

> "Following those opening statements,—which are not evidence but merely introductory statements * * *" (R. 112).

The Court permitted the District Attorney to call witnesses to rebut evidence which was, in no sense of the word, evidence, but which was merely an opening statement by a person unskilled in the practice or knowledge of law. Then followed the introduction of photostatic copies of invoices all of which operated materially to the prejudice of the Petitioners in this case and was certainly, in no small degree, responsible for the result that followed.

We most ernestly and most sincerely urge that the petition for this writ be granted.

Respectfully submitted,

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OCTOBER TERM, 1946

No. 849

JACOB SPEVAK, DOING BUSINESS AS J. SPEVAK AND COMPANY, AND GEORGE LERIAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 45–51) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 6, 1946 (R. 51). The petition for a writ of certiorari was filed January 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether, in the circumstances of the case, petitioners were deprived of their constitutional right to representation by counsel through the trial court's refusal further to continue the trial to enable petitioners to retain trial counsel.

STATEMENT

On April 7, 1945, petitioners were indicted in the United States District Court for the District of Maryland in a multiple count indictment alleging numerous sales of meat at prices in excess of ceiling prices, in violation of the Emergency Price Control Act of 1942, as amended, 50 U. S. C. App., Supp. V, 901, *et seq.* (R. 36).[1] They were brought into court on November 13, 1945, for arraignment, at which time they were represented by Mr. Albert Smalholtz. No plea was entered on that date, and the defendants were given until November 30 to file preliminary motions and to obtain trial counsel. No motions were filed. Shortly before November 30, Mr. Smalholtz withdrew from the case and Mr. William E. Leahy advised the United States Attorney that he had been consulted by petitioners and that he desired that petitioners' cases be continued until he com-

[1] A second indictment was returned at the same time charging petitioner Spevak and others with conspiring to transfer meat at wholesale at over the ceiling prices, and Spevak was convicted at an earlier trial on one count involving a transaction unconnected with this case (R. 36, 39).

pleted the trial of a case in which he was then participating. The United States Attorney brought the request for a continuance to the attention of Judge Coleman and it was granted. The matter was further delayed from time to time to permit Mr. Leahy to complete other business. (R. 36–37.)

After the case had been delayed from November through May 1946, the United States Attorney "decided that it was time to bring the case to a head; and, in order to shorten the trial, we prepared a new criminal information" which contained 40 counts selected from the indictment returned in April 1945. This information was filed May 31, 1946. (R. 37.) The United States Attorney forwarded a copy of the information to petitioners and informed them in writing to appear for arraignment and trial on June 10, 1946; the clerk of the court also gave them a similar notice (R. 37).

Nothing was heard from petitioners until June 5, when Mr. Leahy requested the United States Attorney to agree to a further continuance. Mr. Leahy was advised that the Government would not consent to a further continuance and he thereupon withdrew from the case (R. 37). On the following day, June 6, a Mr. Norman Bowles, Jr., one of petitioners' present counsel, approached the United States Attorney with respect to securing a further continuance to

enable petitioners to retain trial counsel. Mr. Bowles stated that he could not try the case because of other professional commitments. On June 8, 1946, Judge Coleman granted Mr. Bowles' request for a continuance until June 18, 1946. The Assistant United States Attorney promptly informed petitioner Lerian, who was at petitioner Spevak's place of business, that the case had been continued until June 18; he was unable to contact petitioner Spevak. (R. 37–38, 35, 3.)

The United States Attorney heard nothing further from the petitioners until late Friday afternoon, June 14, when petitioners in proper person filed a motion to dismiss and a petition to stay the proceedings to permit them to resort to the Emergency Court of Appeals. On June 15 or 16 a Mr. Edward Schaub informed the Assistant United States Attorney that he had been employed by petitioners as local counsel, but not to try the case. On the morning of June 17, one day prior to the trial date, a Mr. Abraham Glasser entered the case solely for the purpose of handling the petition for a stay of proceedings to enable petitioners to resort to the Emergency Court of Appeals. Mr. Glasser and the Assistant United States Attorney consulted with Judge Coleman in chambers on the afternoon of June 17 and he granted Mr. Glasser leave to present argument in support of his application for a stay in open court on the following day when the case was

called for trial. At the same time petitioners were told that if their motion for a stay was denied, the case would go to trial on June 18. (R. 38, 4, 5.)

On June 18, petitioners were arraigned and entered pleas of not guilty (Tr. 43, 50[2]). The motion to dismiss previously filed by petitioners in proper person was withdrawn and Mr. Glasser argued for a stay of the criminal proceeding and for leave to attack the regulation involved in the Emergency Court of Appeals (R. 40). The stay was denied and a jury was then selected, Messrs. Glasser and Schaub participating (Tr. 107–108). After the jury was sworn the case was continued until the following day (Tr. 108).

On the following day, immediately after the court was convened, it was adjourned for one hour (Tr. 110). When court reconvened petitioners went to trial without counsel (Tr. 109).

At the opening of the trial the court made the following statement (R. 5–6):

> The Court desires to make the following announcement for the benefit of the jury, the Government, and the defendants.
>
> The defendants have had counsel from time to time, but, for various reasons, counsel have withdrawn from the case.

[2] The reference Tr. is to the stenographic transcript of record certified by the clerk of the court below. The printed record consists of the appendices to the briefs filed in the circuit court of appeals and the proceedings in that court.

They may have had good reason. The defendants have been put under an Order to obtain additional counsel, or new counsel, from time to time, but they have not complied with the Court's Order. Yesterday the defendants, therefore, were instructed that if the motion made on their behalf to stay the proceedings pending their going to the Emergency Court of Appeals was denied, they would have to go to trial today, with or without counsel. In other words, the Court felt that they had had due notice the last six months or more with respect to their obligation as to having counsel on hand at the appropriate time.

The Court now is informed that they do not have counsel, according to those Orders; so the Court is requiring them to proceed with the trial now; and if they do not have counsel, they will have to appear in their proper person representing themselves. The law gives every man the right to try his own case, if he wants to, without counsel. It is done frequently.

In the present case the Court has given to these defendants more than the full time over a period of months to have whatever counsel they may desire. There has been no intimation that they are not able to pay for counsel. Where one subject to indictment is faced with trial, if he satisfies the Court that he does not have funds adequate to employ counsel, the Court is authorized to assign counsel to him, and

> does that. That is done quite frequently in this Court. This is not such a case. Therefore, under the circumstance, since the case has been assigned for trial several times, and the Court has been, as it feels, unusually liberal on the point, to the point of undue liberality, as compared with other defendants who are called up for trial, the Court feels that the case must now proceed to trial.
>
> The defendants have a right to stand on their plea of not guilty; and the burden of proving their guilt rests upon the Government, full instructions as to which the Court will give in due course to you, gentlemen of the jury.
>
> In making this announcement the Court is in no sense appearing to pass upon the guilt or innocence of the defendants, but it is merely to explain the obligations they are under to not further delay the trial.

The trial judge then explained the procedure to the petitioners (R. 5–8) and the trial proceeded. Petitioner Spevak made an opening statement to the jury (Tr. 178) and petitioners called witnesses in their defense (Tr. 189, 192). At the conclusion of the case the Government abandoned five counts of the information. The jury found petitioners not guilty on four counts and guilty on the remaining thirty-one. (R. 2.) Petitioners were sentenced to imprisonment for twenty days on each count, the sentences to be served consecutively, and in addition petitioner Spevak was fined a

total of $6,200 and petitioner Lerian $3,100 (R. 2–3).

Immediately after the sentences were imposed Mr. Glasser reentered his appearance in the case for the purpose of applying for bail and taking an appeal (Tr. 225). Separate applications for bail to the trial judge, Circuit Judges Dobie and Soper, and Chief Justice Vinson were denied (see Tr. 226, 230–231). On the appeal to the Circuit Court of Appeals for the Fourth Circuit, the convictions were affirmed (R. 51).

ARGUMENT

Petitioners' sole contention in this Court is that they were denied the right to representation by counsel of their own selection, because after continuances had been had the trial court refused to continue the case again to permit them to retain trial counsel. The trial court assigned as its reasons for refusing further to continue the case the facts that petitioners had had many months in which to secure trial counsel, that they had the benefit of the services of numerous counsel who had participated in the case prior to trial and that the court was convinced that petitioners "have been trifling with the court" (Tr. 62). After examining the record, the circuit court of appeals unqualifiedly concurred in the trial court's conclusions (R. 45–47).

This is not a case in which defendants who were ignorant of their legal rights were forced to go to

trial without benefit of counsel. As the court below pointed out (R. 46), petitioners admittedly spent $20,000 for legal services in connection with the present case. They were represented by counsel through the selection of the jury and counsel again entered the case immediately after judgment was entered. Thus, the sole basis of their claim is that the case was not continued long enough to permit them to obtain the trial counsel that they preferred. We agree with petitioners that they were entitled to an opportunity to secure trial counsel of their own selection, but the Sixth Amendment does not entitle them to insist on continuance after continuance merely because the counsel of their selection is a busy lawyer whose services are in demand.

Assuming that petitioners were sincere in their efforts to delay the trial of the case—an assumption which is hardly warranted—their position was stated by Mr. Glasser, one of their counsel, at the June 17, 1946, hearing before Judge Coleman. He explained to the court that Mr. Smalholtz, petitioners' first counsel, withdrew from the case in November 1945, because petitioners determined to secure "distinguished trial counsel," namely, Mr. Leahy (Tr. 60). From the end of November 1945, through most of May 1946, the prosecution was delayed while Mr. Leahy was engaged in other litigation. Finally, when further delay became intolerable, the Government undertook to

simplify the case by substituting an information containing only some of the counts in the earlier indictment, and petitioners were notified that arraignment and trial was set for June 10, 1946. On June 5, the Government refused to consent to Mr. Leahy's request for a further continuance and he thereupon withdrew from the case. On the following day Mr. Bowles, another of petitioners' counsel, reiterated to the Assistant United States Attorney (see R. 37) that Mr. Leahy "could not try the case," and as a result on June 8 he obtained a continuance until June 18. There is no contention that these facts were not personally known to petitioners.

Thus, viewing the case in the light most favorable to petitioners, on June 8 they knew that Mr. Leahy was not available to try their case, and that their trial had been delayed until June 18 to enable them to secure new trial counsel. In the days that followed Messrs. Glasser and Schaub joined petitioners' corps of attorneys, but not for the purpose of trying the case. Petitioners had a minimum of ten days in which to secure trial counsel for a case which Mr. Leahy avers he could have prepared for trial in two or three days if he were pressed for time (R. 29). As the court below said (R. 48), it cannot be seriously urged that petitioners could not find a competent trial lawyer in Baltimore to represent them at their trial on June 18. Moreover, they

had an abundance of legal talent at their disposal, which they preferred not to use at the trial of their case. As we have said, their lawyers represented them through the selection of the jury and they reentered the case just as soon as the judgment was entered. As early as June 14, four days before the trial, petitioners filed motions in the trial court in proper person—motions which, it is a fair inference, were prepared by persons familiar with the law (R. 38). In these circumstances, we think it plain that petitioners had ample opportunity to secure trial counsel and that their reluctance to have their retained counsel try the case hardly justifies their present claim that they were denied representation by counsel.

In view of these facts and the conclusion of the trial judge that petitioners were "trifling" with the court, there can be no serious doubt that it was not an abuse of discretion not to further continue the trial after June 18, 1946. Cf. *Avery* v. *Alabama,* 308 U. S. 444; *Neufield* v. *United States,* 118 F. 2d 375, 380–384 (App. D. C.), certiorari denied *sub nom. Ruben* v. *United States,* 315 U. S. 798. *United States* v. *Bergamo,* 154 F. 2d 31 (C. C. A. 3), upon which petitioners rely, involved the refusal of a trial court to permit nonresident counsel selected by the defendant to try the case and thus presented quite a different situation from that involved in this case.

CONCLUSION

Petitioners had more than six months in which to prepare for trial. Admittedly they were financially able to retain counsel of their own selection. They had several attorneys representing them at various stages of the case. Their failure to have trial counsel is attributable only to their lack of diligence or to their strategy. In the circumstances shown by the record, the prosecuting attorney and the trial judge would have been remiss in the performance of their duties if they had permitted petitioners to further forestall the trial. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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